Supreme Court, U.S.
FILED

(1) 94 792 NOV 2 1994

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No. _____

IN THE
# SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

HALLCO MANUFACTURING, CO., INC.
and OLOF A. HALLSTROM, *Petitioners*,
v.
RAYMOND KEITH FOSTER, KEITH MFG. CO.,
INC. and KEITH SALES CO., *Respondents*.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Federal Circuit

## PETITION FOR A WRIT OF CERTIORARI

Peter E. Heuser
*Counsel of Record*
David A. Fanning
Kasey C. Christie
KOLISCH HARTWELL DICKINSON
McCORMACK & HEUSER
520 S.W. Yamhill St., Suite 200
Portland, OR 97204
(503) 224-6655
*Attorneys for Petitioners*

October 28, 1994

41pp

## QUESTIONS PRESENTED

1. Whether a trial court should grant a motion for relief from judgment either under Rule 60(b)(3), for reason of fraud, misrepresentation, or other misconduct, or under the "fraud on the court" saving provision of Rule 60(b), where there is uncontroverted *prima facia* evidence that an adverse party willfully altered a key trial exhibit and that such misconduct affected the trial.

2. Whether, on a motion to set aside judgment under the "fraud upon the court" saving provision of Rule 60(b), it is permissible for a trial court to give no weight to a jury verdict that an adverse party "willfully" altered a key trial exhibit "in an attempt to mislead the court and jury."

## PARTIES TO THE PROCEEDING

All parties to the proceeding in the Court of Appeals are identified in the caption.

## RULE 29.1 LISTING

Pursuant to Supreme Court Rule 29.1, Petitioners state there are no parent or subsidiary companies to be listed.

## TABLE OF CONTENTS


QUESTIONS PRESENTED . . . . . i

PARTIES TO THE PROCEEDING . . . . . ii

RULE 29.1 LISTING . . . . . ii

TABLE OF AUTHORITIES . . . . . vi

I. OPINIONS BELOW . . . . . 2

II. JURISDICTION . . . . . 2

III. STATUTE INVOLVED . . . . . 2

IV. STATEMENT OF THE CASE . . . . . 3

A. District Court Proceedings 3

1. '760 Patent . . . . . 3

2. Drive Unit PX 162 . . 4

3. Jury's Verdict . . . . 6

4. Post-Trial Motion . . 6

B. Court of Appeals Proceedings 8

V. REASONS FOR GRANTING THE PETITION 9

A. Because of the absence of decisions from this Court

regarding Rule 60(b)(3) and the "fraud upon the court" saving provision of Rule 60(b) of the Federal Rules of Civil Procedure, this case provides an opportunity to provide needed instruction to the lower courts that the presentation of uncontroverted *prima facia* evidence showing fraud requires a trial court to rule that the non-moving party engaged in "fraud upon the court" under Rule 60(b) or fraud, misrepresentation, or other misconduct under Rule 60(b)(3). . . . . 9

B. This Court should accept and reverse the judgment in this case to prevent the public from losing faith and confidence in the federal judicial system, caused by a trial court's complete disregard of a jury verdict holding that a party had willfully altered a key trial exhibit. . . . . 15

CONCLUSION . . . . . 19

**TABLE OF CONTENTS** (Cont'd)

APPENDICES

Judgment of the Court of Appeals . . . . . 1a

Opinion of District Court 3a

List of Supreme Court's Rule 60(b) Cases . . . . . 11a

## TABLE OF AUTHORITIES

Page(s)

### CASES


Anderson v. Cryovac, Inc.,
862 F.2d 910
(1st Cir. 1988) . . . . . 10, 11

Florida v. Rodiquez,
469 U.S. 1 (1984) . . . . . 15

Harre v. A.H. Robins Co.,
750 F.2d 1501 (11th Cir. 1985) 11

Hazel-Atlas Glass Co. v.
Hartford Empire Co.,
322 U.S. 238 (1944) . . . 9, 13-17

In re Intermagnetics America,
926 F.2d 912
(9th Cir. 1991) . . . . 13, 14, 16

In re Murchison,
349 U.S. 133 (1955) . . . . . 18

Jones v. Aero/Chem Corp.,
921 F.2d 875
(9th Cir. 1990) . . . . . 11

Liljeberg v. Health Services
Acquisition Corp.,
486 U.S. 847 (1988) . . . . . 18

## TABLE OF AUTHORITIES (Cont'd)


Rozier v. Ford Motor Co., 573 F.2d 1332 (5th Cir. 1978) . 11

Square Construction Co. v. Washington Metropolitan Area Transit Authority, 657 F.2d 68 (4th Cir. 1981) . . . . . 11

Stridiron v. Stridiron, 698 F.2d 204 (3d Cir. 1983) . . 11


### RULES AND STATUTES


28 U.S.C. § 1254(1) . . . . . 2

35 U.S.C. § 102(b) . . . . . 3

35 U.S.C. § 112 . . . . . 7

Fed. R. Civ. P. 59 . . . . . 6, 8

Fed. R. Civ. P. 60(b) . . i, 2, 7-11, 13, 15-17, 19

Fed. R. Civ. P. 60(b)(3) i, 7, 9-13, 15, 16

Fed. R. Civ. P. 60(b)(6) . . . . . 18


### MISCELLANEOUS


7 *Moore's Federal Practice* ¶ 60.33 . 14

IN THE

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No. _____

HALLCO MANUFACTURING, CO., INC.
and OLOF A. HALLSTROM, *Petitioners*,

v.

RAYMOND KEITH FOSTER, KEITH MFG. CO.,
INC. and KEITH SALES CO., *Respondents*.

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On Petition For A Writ Of Certiorari
To The Unites Stated Court Of Appeals
For The Federal Circuit

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## PETITION FOR A WRIT OF CERTIORARI

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Petitioners Hallco Manufacturing, Co., Inc. and Olof A. Hallstrom ("Hallco"), petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

## I. OPINIONS BELOW

The opinion of the Court of Appeals (App., *infra*, 1a) is not reported. The opinion of the district court (App., *infra*, 4a-7a) is not reported.

## II. JURISDICTION

The United States Court of Appeals for the Federal Circuit entered its judgment on August 5, 1994 (App., *infra*, 1a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## III. STATUTE INVOLVED

Rule 60(b) of the Federal Rules of Civil Procedure provides in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: ...(3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;... [Saving provision:] This rule does not limit the power of a court ... to set aside a judgment for fraud upon the court.

## IV. STATEMENT OF THE CASE

### A. District Court Proceedings:

The plaintiffs (respondents in present action) in the declaratory judgment action, Raymond Keith Foster, Keith Manufacturing Co., and Keith Sales Co. (collectively "Foster"), contended that they did not have to pay royalties on their new Running Floor II conveyor (the "RF II") because such conveyor was not covered by any valid claim of the licensed patents of the defendants (petitioners in present action), Hallco Manufacturing Company Inc. and Olof A. Hallstrom (collectively "Hallco"). Hallco asked the court to rule that it had properly terminated the license agreement, and that Foster's sales of the RF II conveyor infringe the licensed patents [including U.S. Patent No. 4,143,760 ('760)]. The court ruled on summary judgment that the license agreement had been properly terminated by Hallco, and at trial the jury ruled that the '760 patent was infringed by Foster's RF II conveyor.

1. '760 Patent. Claims 1 and 4 of the '760 patent define a conveyor having a unique mode of motion referred to as the "1-2-3 mode," as distinguished from the older and well-known "inch mode." Under 35 U.S.C. § 102(b), a patent is invalid if the patented invention was publicly used

or on sale more than one year prior to the patent application's filing date.[1] Therefore, if Foster could have established, as it claimed it could, that Hallco was selling conveyors operating in the 1-2-3 mode more than one year prior to the January 10, 1975 filing date of the '760 patent, this would have gone a long way toward invalidating claims 1 and 4 of the patent.

2. Drive Unit PX 162. Foster contended that a conveyor system sold by Hallco to Foster in 1973, which was in turn installed in a trailer and sold by Foster to Arthur Wilkens, operated in the patented 1-2-3 mode of motion. Hallco agreed that the trailer in question was sold to Wilkens in 1973, but contended that its conveyor drive unit operated in the inch mode of motion and not the 1-2-3 mode of motion. To attempt to prove its point, Foster submitted into evidence a drive unit PX 162 that was installed in the Wilkens trailer in 1973 and that it claimed operated originally in the 1-2-3 mode of motion.

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[1] 35 U.S.C. § 102(b) is in pertinent part: "A person shall be entitled to a patent unless ... the invention was ... in public use or on sale in this country, more than one year prior to the [filing] date of the application for patent in the United States."

Hallco realized that PX 162 had been altered by Foster to operate in the 1-2-3 mode, so Hallco showed the jury DX 673, a drive with an inch mode of motion, and demonstrated what would have had to be done to modify the unit to operate in a 1-2-3 mode. Hallco also showed: (1) PX 162 includes milled out portions which correspond to similar portions found in the DX 673, and these portions would not have been necessary if PX 162 always operated in the 1-2-3 mode; (2) PX 162 includes a shiny spot where something had been ground off and which is where a cam plate would have been originally mounted if the unit operated in the inch mode and which would have had to be removed in order for it to operate in the 1-2-3 mode; and (3) Foster's expert Samuel Windsor testified that he inspected another drive unit shortly before trial which also operated in the 1-2-3 mode, thus showing that mode of operation alterations must have been made because Foster never contended that more than one of these original drives operated in the 1-2-3 mode.

Foster has never presented any explanation addressing the three points raised by Hallco showing the alteration of PX 162. Foster's counsel even admitted in his closing argument that he had no explanation for Hallco's evidence of alteration, when he said "we are

concerned" and "[i]t bothered me to see that."

Hallco presented evidence showing that its trial presentation was affected by Foster's misconduct. In particular, Hallco showed that rebuttal of the altered evidence became the primary focus of Hallco's efforts at trial, to the detriment of its defense of Foster's contention of patent invalidity as to the best mode requirement. Foster never contradicted Hallco's proof that its trial presentation was affected by Foster's misconduct.

3. Jury's Verdict. The jury found that Foster's RF II infringed the '760 patent, but that the '760 patent was invalid based upon a violation of the best mode requirement.[2] The jury also found "that Foster tried to willfully mislead the court and jury with respect to the drive unit, identified as plaintiffs' Exhibit 162, the drive unit which Foster contends represents the 1973 45-foot Wilkens drive unit."

4. Post-Trial Motion: Following entry of judgment, Hallco filed a timely motion for new trial pursuant to Rule 59

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[2] 35 U.S.C. § 112 requires in pertinent part: "The specification [of a patent application]...shall set forth the best mode contemplated by the inventor of carrying out his invention."

and for relief from judgment pursuant to Rule 60(b). Specifically, Hallco asked that the judgment as to invalidity based upon a best mode violation be set aside due to Foster's alteration of evidence relating to the 1973 conveyor drive unit PX 162. In that motion Hallco pointed out and Foster agreed that it was not necessary to prove that Foster's fraud affected the verdict, but only that it affected Hallco's trial of its case. The district court denied Hallco's motion. Hallco subsequently filed a request that the district court entertain a motion for relief under Rule 60(b), and the court indicated that it would deny that request.

In the denial of Hallco's motions, the court recited the applicable standard that it should use in determining whether to grant a Rule 60(b)(3) motion (App., *infra*, 5a). However, the court noted that since the jury found Foster's misconduct to be "willful" rather than base their verdict on the clear and convincing evidence standard (App., *infra*, 6a), it should give no credence to the verdict. The court also stated that the jurors were instructed to determine the true facts, were told that they could believe or disbelieve any part of the testimony of any witness, and if the witness had intentionally given false testimony in some part, they may distrust the rest of the person's testimony (App., *infra*, 6a).

The court concluded its Opinion with the statement that the trial tactics and strategy of Foster did not deny Hallco "an opportunity to fully and fairly present its case or defenses" (App., *infra*, 7a). The court plucked the quoted language from the cases cited by the parties to justify its denial of Hallco's motion, but its analysis of the jury instructions shows that the trial court was looking to the effect which the verdict had on the jury verdict and not on the effect it had on Hallco's trial of the case. Of equal importance is the fact that the court also failed to address the effect Foster's conduct had on the integrity of the judicial process, which is the required analysis under the Rule 60(b) saving provision.

B. **Court of Appeals Proceedings:**

Foster appealed to the Federal Circuit the patent infringement finding of the district court and Hallco cross-appealed the district court's failure to grant Hallco's post trial motion under Rules 59 and 60(b) that Hallco is entitled to a new trial with regard to compliance with best mode requirements because of Foster's willful alteration of a trial exhibit. The Federal Circuit summarily affirmed the district court in a *per curiam* judgment without opinion.

## V. REASONS FOR GRANTING THE PETITION

**A. Because of the absence of decisions from this Court regarding Rule 60(b)(3) and the "fraud upon the court" saving provision of Rule 60(b) of the Federal Rules of Civil Procedure, this case provides an opportunity to provide needed instruction to the lower courts that the presentation of uncontroverted *prima facia* evidence showing fraud requires a trial court to rule that the non-moving party engaged in "fraud upon the court" under Rule 60(b) or fraud, misrepresentation, or other misconduct under Rule 60(b)(3).**

In the forty-six year history of the current version of Rule 60(b)[3], the Supreme Court has *never* ruled on what standard the lower courts should use in determining whether to grant a motion under Rule 60(b)(3). Nor, since Hazel-

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[3] Rule 60(b) was promulgated by the Supreme Court in 1938 and it was amended in 1946 to include Rule 60(b)(3) and the "fraud on the court" saving provision. The 1946 amendment became effective in 1948.

Atlas Glass Co. v. Hartford Empire Co., 322 U.S. 238 (1944), has the Supreme Court elaborated on the application of the "fraud on the court" saving provision of Rule 60(b).

Rule 60(b)(3): Under Rule 60(b)(3), the courts have the power to grant a motion for relief from judgment when an adverse party is guilty of fraud, misrepresentation or other misconduct, but courts are left without guidance as to when to exercise this power. The First Circuit noted that the text of Rule 60(b)(3) gives "precious little guidance as to how a court should ascertain the existence of misconduct, weigh its effect, and ultimately determine when to provide relief from a judgment." Anderson v. Cryovac, Inc., 862 F.2d 910, 923 (1st Cir. 1988).

In the absence of guidance from this Court, at least six of the circuits -- specifically, the 1st, 3d, 4th, 5th, 9th, and 11th Circuits -- have established some guideposts to determine when to grant a motion under Rule 60(b)(3). The movant must:

1. demonstrate by clear and convincing evidence that the verdict was obtained through fraud, misrepresentation, or other misconduct; and

2. show that the misconduct prevented the movant full and fair preparation or presentation of its case.

Jones v. Aero/Chem Corp., 921 F.2d 875, 878 & (9th Cir. 1990); Harre v. A.H. Robins Co., 750 F.2d 1501, 1503 (11th Cir. 1985); Stridiron v. Stridiron, 698 F.2d 204, 207 (3d Cir. 1983); Square Construction Co. v. Washington Metropolitan Area Transit Authority, 657 F.2d 68, 71 (4th Cir. 1981); Rozier v. Ford Motor Co., 573 F.2d 1332, 1339 (5th Cir. 1978); Anderson, 862 F.2d at 926.

However, no court has ever said whether uncontroverted *prima facia* evidence demonstrating fraud or misconduct requires that a Rule 60(b)(3) motion be granted. The question left completely unanswered, even by those circuits which have established Rule 60(b)(3) guideposts, is whether the presentation of uncontroverted *prima facia* evidence demonstrating fraud or misconduct requires the granting of a Rule 60(b) motion, or whether a court can, in its discretion, completely ignore uncontroverted evidence offered to prove fraud.

This case presents an opportunity for this Court to adopt a universal standard for the lower courts to follow regarding Rule 60(b)(3). The two-prong test for deciding Rule 60(b)(3) motions adopted by at least six of the circuits is a logical

and reasonable standard. However, the test needs clarification or supplementation for which this case is ideally suited. Specifically, this Court can rule that if no evidence is presented by an adverse party to contradict the *prima facia* evidence of the movant, then the two-prong test is satisfied and the motion should be granted.

The corollary or clarification of the two-prong test is somewhat akin to the summary judgment standard except that the court is given additional guidance because the determination is made after the presentation of all of the evidence and after the jury has rendered its verdict. Therefore, upon a motion for relief under Rule 60(b)(3), a court may make a preliminary determination whether the movant has made a *prima facia* case that a verdict was obtained through misconduct and that the misconduct affected the trial of the movant's case. If the adverse party has failed to present any evidence contradicting the movant's *prima facia* evidence, then the court must conclude that the test is satisfied and grant the motion. If, however, the adverse party has presented evidence contradicting the movant's evidence, then the court should weigh the evidence to determine if the two prongs have been proven by the movant.

Although the jury did not specifically use the clear and convincing

standard in finding Foster's misconduct, the court should have granted Hallco's motion for relief from judgment under Rule 60(b)(3) because Foster presented no evidence contradicting Hallco's *prima facia* evidence and the jury found that Foster's misconduct was willful. In addition, the district court's reliance on the jury instructions shows that the court failed to apply the appropriate standard by focusing on the effect of Foster's misconduct on the jury verdict rather than on Hallco's presentation of its case.

Saving Provision: Under the "fraud on the court" saving provision of Rule 60(b), inquiry into the second prong of Rule 60(b)(3) -- whether the misconduct foreclosed full and fair preparation or presentation -- is irrelevant. The sole focus is on whether the misconduct in question harms the integrity of the judicial process itself. In re Intermagnetics America, 926 F.2d 912, 917 (9th Cir. 1991); Hazel-Atlas, 322 U.S. 238, 246 (1944). Foster's alteration of physical trial evidence and testimony denying the alteration is a form of misconduct that harms the integrity of the judicial process itself.

On a motion under the "fraud on the court" saving provision of Rule 60(b), the court must determine whether the action of an adverse party harmed the integrity of the judicial process itself, based on

several factors. These factors should include the evidence presented by the movant, the evidence presented by the adverse party, and the jury's verdict. The motion should be granted when an adverse party presents no evidence contradicting the movant's *prima facia* evidence proving the misconduct. Furthermore, the motion should be granted when the jury finds that the same adverse party attempted to "willfully mislead" the court and the jury by altering the evidence.

The seminal case on this issue is Hazel-Atlas Glass Co. v. Hartford Empire Co., supra[4], in which "the Supreme Court granted relief though the complainant had waited nine years to bring the action and had learned about the possibility of fraud during the first proceeding." In re Intermagnetics, 926 F.2d at 916. Hazel-Atlas, like this case, was a patent infringement case. In Hazel-Atlas, as in this case, a litigant introduced fraudulent evidence. In Hazel-Atlas, as

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[4] Hazel-Atlas was decided four years before the effective date (1948) of the "fraud on the court" saving provision of amended Rule 60(b), but the Court's decision was based on the judicially-devised equitable predecessor of the "fraud on the court" saving provision of amended Rule 60(b). See 7 *Moore's Federal Practice* ¶ 60.33.

in this case, the litigant's chicanery was ultimately found out. In this case, as in Hazel-Atlas, this conduct should not be ignored.

Absence of Supreme Court Rulings on Rule 60(b): During the entire fifty-six year history of Rule 60(b), the Supreme Court has written only fourteen opinions or memoranda that substantively addressed Rule 60(b).[5] Of those cases, none have addressed Rule 60(b)(3) and only Hazel-Atlas in 1944 addressed the "fraud on the court" saving provision.

In order to perform its "supervisory authority" over the lower federal courts (see Florida v. Rodiquez, 469 U.S. 1 (1984)), this Court should accept the present case so that standards for deciding Rule 60(b) motions can be enumerated.

B. **This Court should accept and reverse the judgment in this case to prevent the public from losing faith and confidence in the federal judicial system, caused by a trial court's complete disregard of a jury verdict holding that a party had willfully altered a key trial exhibit.**

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[5] The list of the fourteen cases is found in Appendix C.

When the district court ruled on Hallco's motions after the trial, the court ignored the jury verdict that found "that Foster tried to willfully mislead the court and jury" by altering a key trial exhibit. The court also ignored Hallco's motion as to the "fraud on the court" saving provision of Rule 60(b).

As discussed *supra*, the district court misapplied the two-prong Rule 60(b)(3) standard and denied Hallco's Rule 60(b)(3) motion by relying on the absence of the clear and convincing evidence standard in the jury's verdict and the first prong's requirement of proving the effect of Foster's misconduct by clear and convincing evidence. Although the court's failure to address Hallco's "fraud on the court" motion and its disregard for the jury verdict is disturbing, one might surmise that if the court had actually considered the motion at all, it might have denied it for reasons similar to its denial of Hallco's Rule 60(b)(3) motion. However, this analysis cannot be correct because the two-prong Rule 60(b)(3) test is not the test used to determine whether to grant a "fraud on the court" Rule 60(b) motion.

The sole test is whether the misconduct in question harms the integrity of the judicial process itself. In re Intermagnetics America, 926 F.2d at 917; Hazel-Atlas, 322 U.S. at 246. The clear

and convincing evidence standard does not exist in this independent "fraud of the court" test provided by this Court in Hazel-Atlas. Therefore, not only should the district court have addressed Hallco's "fraud on the court" Rule 60(b) motion, but based on the jury verdict finding that Foster attempted to "willfully mislead the court and the jury," the court was required to grant Hallco's motion as a matter of law.

The district court's action, or inaction, demonstrates a lack of respect for the procedural rules of the judicial system, namely, the role of the jury as the fact-finder and its inaction is all the more disconcerting since the one of the basis for the provision is to foster the public's faith and confidence in our judicial system.

The judge and jury each have a primary role to play in the administration of justice. The trial judge's role is to assure the proper administration of justice based on the laws and rules of procedure. The jury's role is as the fact-finder. The jury listens to the best arguments of each side and decides what the facts are and what is the truth.

Once the jury has made determinations of fact, a trial judge's actions must be consistent with the jury's findings. If trial judges routinely disregard or ignore a jury's finding of fact, then the public

would have reason for concern. The public may eventually lose faith in the American system of justice because of judges' apparent usurpation of the jury's power by ignoring jury's fact findings.

This Court clearly acknowledged the importance of the public's perception of the justice system in Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847 (1988). After a judge's decision in a contract dispute, the losing party filed a motion under Rule 60(b)(6) to overturn the judgment because the trial judge should have disqualified himself. The judge had an affiliation with a third party who was involved in ongoing negotiation during trial with the prevailing party on the subject matter at the heart of the contract dispute. Justice Stevens said that "in determining whether a judgment should be vacated...it is appropriate to consider...the *risk of undermining the public's confidence in the judicial process*." Liljeberg, 486 U.S. at 864 (emphasis added). Quoting In re Murchison, 349 U.S. 133, 136 (1955), the Court said that we must continuously bear in mind that "to perform its highest function in the best way 'justice must satisfy the appearance of justice.'" Id.

In order for justice to satisfy the appearance of justice, it is important for this Court to utilize its supervisory function over the lower courts by hearing

this case to determine whether a trial court can give no weight to what should have been a binding jury verdict and refuse to rule or acknowledge a "fraud on the court" saving provision of Rule 60(b) motion based on the jury's verdict.

For these reasons, the decision below fully warrants this Court's review.

## CONCLUSION

The Petition for a writ of certiorari should be granted.

Respectfully submitted,

Peter E. Heuser
*Counsel of Record*
David A. Fanning
Kasey C. Christie
KOLISCH HARTWELL
DICKINSON McCORMACK
& HEUSER
520 S.W. Yamhill St.
Suite 200
Portland, Oregon 97204
(503) 224-6655

*Attorney for Petitioners*
Hallco Manufacturing,
Co., Inc. and Olof A.
Hallstrom

October 28, 1994

# APPENDICES

**APPENDIX A**
**JUDGMENT OF THE COURT OF APPEALS**
No. 88-CV-959

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IN THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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Nos. 94-1014, 94-1036

RAYMOND KEITH FOSTER, KEITH MFG. CO., INC., AND KEITH SALES CO., *Plaintiffs-Appellants*,

v.

HALLCO MANUFACTURING CO., INC., OLOF A. HALLSTROM, *Defendants/Cross-Appellants*.

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On Appeal from the United States District Court for the District of Oregon, No. 88-CV-959. D. Or. Affirmed.

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DECIDED August 5, 1994.

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Before NIES, Circuit Judge, SKELTON, Senior Circuit Judge, and RADER, Circuit Judge.

**JUDGMENT**

**PER CURIAM.**

**AFFIRMED.** See Fed. Cir. R. 36.

**APPENDIX B**
**OPINION OF DISTRICT COURT**
Civ. No. 88-959-FR.

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IN THE UNITED STATES DISTRICT COURT, D. OREGON

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RAYMOND KEITH FOSTER, KEITH MFG. CO., INC., AND KEITH SALES CO., *Plaintiffs-Appellants*,

v.

HALLCO MANUFACTURING CO., INC., OLOF A. HALLSTROM, AND ROBERT MARTIN SNELLMAN, *Defendants*.

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Sept. 14, 1993.

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Ted E. Runstein
Kell, Alterman & Runstein
Portland, Or.
Delbert J. Barnard
Glenn D. Bellamy
Barnard, Pauly, Kaser & Bellamy
Seattle, Washington, for plaintiffs.

Peter E. Heuser
David A. Fanning
Kolisch, Hartwell, Dickinson, McCormack & Heuser
Portland, Oregon, for defendants.

**OPINION**

FRYE, District Judge:

Plaintiffs, Raymond Keith Foster, Keith Mfg. Co., Inc., and Keith Sales Co. (collectively, "Foster"), brought this action against the defendants, Hallco Manufacturing, Co., Inc., Olof A. Hallstrom, and Robert Snellman (collectively "Hallco"). The matter before the court is the motion of Hallco for a new trial and for relief from judgment (# 518).

Following the presentation of evidence and the argument of counsel, the jury was instructed to answer seventeen interrogatories. Interrogatory No. (13) provides as follows:

Did Foster prove by clear and convincing evidence that Hallstrom failed to disclose the best mode known to him when he filed the application which became the '760 patent, as to either claim 1 or claim 4 of the '760 patent....

The jury answered "yes" to Interrogatory No. (13) as to both claim 1 and claim 4.

Interrogatory No. (17) provides as follows:

Do you find that [Keith] Foster tried to willfully mislead the court and jury with respect to the drive unit, identified as plaintiffs' exhibit 162, the drive unit

which Foster contends represents the 1973 45-foot Wilkens drive unit?

The jury answered "yes" to Interrogatory No. (17).

Foster objected to the inclusion of Interrogatory No. (17). In his argument for the submission of Interrogatory No. (17) to the jury, counsel for Hallco stated as follows:

Interrogatory number 17 talks about the drive unit itself. We believe that was altered intentionally to deceive, and so we want the jury to make a determination on those two points. It's very relevant, especially to two things.

If this case is an exceptional case under the patent statutes, defendants can be awarded attorneys' fees if the Court deems it proper. Additionally, if defendant prevails, there's a possibility of an injunction. That's equitable relief and any conduct by Mr. Foster through the course of the trial should be considered in determining equitable relief. And so these factual findings which [sic] serve as the basis for both exceptional case and injunctive relief; therefore, they're completely relevant.

Transcript of Jury Trial Proceedings, Vol. 16, pp. 2921-2922.

When asked by the court what were the consequences if the jury returned an answer of "yes" to Interrogatory No. (17), counsel for Hallco stated, "Then Your

Honor has a basis for deciding whether the case is exceptional and for considering an injunction." Id. at 2926.

**CONTENTIONS OF THE PARTIES**

Hallco moves for a new trial on the issue of the disclosure of the best mode.

Alternatively, Hallco seeks a new trial as to all matters concerning the '760 patent. Hallco contends that the jury's answer to Interrogatory No. (17) regarding fraud and misconduct on the part of Foster relating to the drive unit in the 1973 Wilkens trailer warrants a new trial because Hallco was deprived of an opportunity to fully and fairly litigate the issue of the best mode known.

Foster contends that he did not willfully mislead the court, but that even if the court finds that he did, a new trial is not warranted.

**APPLICABLE STANDARD**

The parties agree that the controlling law is the law of the United States Court of Appeals for the Ninth Circuit. See Amstar Corp. v. Envirotech Corp., 823 F.2d 1538, 1550 (Fed.Cir.1987). To receive a new trial under Fed.R.Civ.P. 60(b)(3), "the moving party must establish that a judgment was obtained by fraud, misrepresentation, or misconduct, and that

the conduct complained of prevented the moving party from fully and fairly presenting the case." In re M/V Peacock, 809 F.2d 1403, 1404-05 (9th Cir.1987). This is a two-prong test. Hallco must first establish the fraudulent act by clear and convincing evidence. Jones v. Aero/Chem Corp., 921 F.2d 875, 878-79 (9th Cir.1990). Hallco must then prove that the fraudulent act prevented Hallco from fully and fairly presenting its case or defenses. Id. at 879.

**ANALYSIS**

The jury found that "Foster tried to willfully mislead the court and jury with respect to the drive unit ... which Foster contends represents the 1973 45-foot Wilkens drive unit." Interrogatory No. (17). No standard of proof was provided in Interrogatory No (17); therefore, the court cannot conclude that the jury made this finding by clear and convincing evidence. Moreover, the court does not separately find that Hallco has shown by clear and convincing evidence that Foster willfully attempted to mislead the court and the jury.

See Instruction No. 14 (defining "clear and convincing evidence").

Hallco contends that the jury "had been asked to apply and rely on perjured testimony." Defendants' Memorandum in

Support, p. 3. The jurors were instructed orally and in writing to determine the true facts. They were told that they could believe or disbelieve all or any part of the testimony of any witness, and that if a witness had intentionally given false testimony in some part, they may distrust the rest of that person's testimony. See Instructions Nos. 3, 6 and 8. The jury was never instructed specifically or by inference to apply or rely on false testimony.

Hallco argues now that it is entitled to a new trial based on the jury's answer to Interrogatory No. (17). However, at trial, Hallco represented to the court that an affirmative answer to Interrogatory No. (17) would provide the court only with "a basis for deciding whether the case is exceptional and for considering an injunction." Transcript of Jury Trial Proceedings, Vol. 16, p. 2926. The court would not have submitted Interrogatory No. (17) to the jury had it known that Hallco would argue that the verdict should be set aside because Interrogatory No. (17) had been submitted. As counsel for Foster put it, "[I]f we were to submit a special interrogatory on every single potential contradiction of testimony in this trial, there would be hundreds [of special interrogatories] and many, many of them would be directed to Mr. Hallstrom's statement." Id. at 2922.

## CONCLUSION

The jury did not find, by clear and convincing evidence, that Foster willfully intended to mislead the jury or to mislead the court. Moreover, the trial tactics and strategy of Foster did not deny Hallco an opportunity to fully and fairly present its case or defenses. Hallco has not met its burden to show that it is entitled to a new trial or to relief from judgment. Accordingly, the motion of Hallco for a new trial and for relief from judgment (# 518) is denied.

**APPENDIX C**
**List of Supreme Court's Rule 60(b) Cases**

The following is a list of the Supreme Court cases that have substantively addressed Rule 60(b):

* Pioneer Inv. Services Co. v. Brunswick Associates Ltd. Partnership, 507 U.S. ____, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993). Dealt with defining "excusable neglect" under Rule 60(b);
* Rufo v. Inmates of Suffolk County Jail, 502 U.S. _____, 112 S.Ct. 748, 116 L.Ed.2d 867 (1992). Dealt with Rule 60(b)(5) regarding relief from final decree when it is no longer equitable;
* Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, (1988). - 60(b)(6): Regarding relief from judgment based on a judges appearance of non-impartiality;
* Kirby Forest Industries, Inc. v. U.S., 467 U.S. 1, (1984). - Rule 60(b) was interpreted to be available to party to challenge value of a condemnation award;
* James v. U.S., 459 U.S. 1044, (1982). - This memo noted an analogy between Rule 60(b) and a motion to reduce sentence in a criminal case;
* Browder v. Director, Dept. of Corrections of Illinois, 434 U.S. 257

(1978). - A timely appeal may be taken from a ruling on a Rule 60(b) motion;

* Standard Oil Co. of California v. U.S., 429 U.S. 17, (1976). - Court notes the abolishment of the requirement that leave be obtained from the appellate court before a lower court can entertain a Rule 60(b) motion;
* Pitchess v. Davis, 421 U.S. 482, (1975). - Rule 60(b): The State failed to provide exculpatory evidence to defendant;
* Forman v. Davis, 371 U.S. 178, (1962). - Court treated a Rule 60(b) motion as a Rule 59(e) motion;
* System Federation No. 91, Ry. Emp. Dept. v. Wright, 364 U.S. 642, (1961). - Court issuing an injunction has the power to modify it if a change in circumstances, law or fact, make it appropriate;
* Polites v. United States, 364 U.S. 426, (1960). - Party is not entitled to the grant of a 60(b) motion on the ground of change in the law under the circumstances of the case;
* Ackermann v. U.S., 340 U.S. 193, (1950) - Rule 60(b)(1) and 60(b)(6): regarding failure of party of appeal from a judgment of denaturalization;
* Klapprott v. United States, 335 U.S. 601 (1949), modified 336 U.S. 942, -

Rule 60(b) can be used to overturn a default judgment; and

* Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, (1944). - Regarding the "fraud on the court" saving provision of Rule 60(b): Party committed "fraud on the court" by falsely attributing a highly complimentary article on their patent to disinterested party (when they actually had bribed him).